No. 2520

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,
Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, A CORPORATION,
Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

C. A. SPAULDING,
L. V. BEAULIEU,
For Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

HILL COUNTY,

Plaintiff in Error,

vs.

SHAW AND BORDEN COMPANY, A CORPORATION,

Defendant in Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This writ of error is brought to reverse a judgment for $4,-648.99 rendered in the District Court in favor of defendant in error and against plaintiff in error in an action by the former to recover from the latter the value of certain personal property. The controversy between the parties arose out of a contract entered into by the plaintiff in error, Hill County, with one B. B. Weldy for the furnishing by Weldy of certain county printing. (Printed Transcript pp. 23-27), and a subsequent contract of subletting of a portion of such contract to defendant in error (Printed Transcript pp. 2-3-19-20-21-30-

31). Under the restrictive terms of the statute law of Montana municipal subdivisions of the state, such as counties, can only contract for the printing required by them with the proprietor of a newspaper which has been published within the county for a period of six months prior to the letting of the contract; and if any portion of such contract is sublet the county must require that it be sublet to some newspaper or printing establishment within the state. The statutory requirements pertinent to the questions raised are found in Section 2897 Revised Codes of Montana, and are as follows:

> "It is hereby made the duty of the county commissioners of the several counties of the state of Montana to contract with some newspaper of general circulation, published within the county, and having been published continuously in such county at least six months immediately preceding the awarding of such contract to do and perform all the printing for which said counties may be chargeable, including all legal advertising required by law to be made, blanks, blank books and official publications, at not exceeding the following prices: * * * All newspapers which may receive any contract for printing under this act which may not be able to execute any part of such contract shall be required to sublet such contract or portion to some newspaper or printing establishment within the state, which may be competent to execute such work, at not to exceed the rates herein mentioned."

The contract of Hill County with Weldy was let to one statutorily qualified to receive the same. (Complaint of defendant in error paragraph IV, Printed Transcript p. 2; Agreed Statement of Facts, paragraph 4, Printed Transcript p. 39.) The contract of subletting by Weldy to defendant in error under the terms of which the property sued for in this action was furnished was in contravention of the statute providing that any such contract of subletting must be to some print-

ing establishment within the state and was therefor void and unenforecable. (Complaint of defendant in error, paragraphs V and VI, Printed Transcript pp. 2-3; Agreed Statement of Facts, paragraphs 5-6-7-8, Printed Transcript pp. 39-40). Such contract of subletting was subsequently adjudicated to be invalid by the Supreme Court of Montana in the case of Hershey v. Neilson, 47 Mont. 132, and the Board of County Commissioners of plaintiff in error, Hill County, was permanently enjoined and restrained from allowing or paying any moneys thereunder. (Answer of plaintiff in error paragraph 6, Printed Transcript pp. 21-22; Agreed Statement of Facts, paragraph 9, Printed Transcript pp. 31-32-33).

After the issues had been framed upon the pleadings found in the record (Printed Transcript pp. 2-15; 19-29) the parties filed in the District Court an agreed statement of facts (Printed Transcript pp. 30-35) from which it appears:

1. That defendant in error is a corporation and a citizen of the state of Washington;

2. That plaintiff in error is a duly organized and created county of the state of Montana;

3. That plaintiff in error on the 3rd day of March, 1912, entered into a contract with one B. B. Weldy for certain county printing, the same being the contract attached to the answer filed in this cause;

4. That Weldy sublet certain portions of said contract to defendant in error, and defendant in error under such subletting furnished and delivered to plaintiff in error the property sued for in the present action;

5. That defendant in error has never owned or published a

newspaper and has never owned or operated a printing establishment in the state of Montana;

6. That prior to the aforesaid subletting by Weldy defendant in error knew of the inhibitory provisions of Section 2897 of the Revised Codes of Montana;

7. That after such subletting by Weldy to defendant in error a taxpayer of Hill County brought an action in the District Court of that county to restrain the Board of County Commisssioners from allowing and the County Treasurer from paying for any of the property delivered to the county under the subletting by Weldy to defendant in error; that such action eventuated in a judgment permanently restraining and enjoining the Board from allowing and the Treasurer from paying for any of such property; that an appeal was taken from this judgment to the Supreme Court of Montana and the same was there affirmed and that since such affirmance that judgment has been and is now a final judgment in that cause;

8. That the value of the property furnished under the subletting by Weldy to defendant in error was $4,348.80 and such property belonged to defendant in error at all times before furnishing and delivering the same under said contract;

9. That before commencing the present action defendant in error presented its verified claim for the value of this property to the Board of County Commissioners of plaintiff in error, and that said claim was rejected and disallowed;

10. That plaintiff in error knew before receiving the property sued for that it was furnished by defendant in error under its contract of subletting with Weldy, and likewise knew that defendant in error was not the owner or publisher of a newspaper within the state of Montana and was not the owner or proprietor of a printing establishment within said state;

11. That the property was shipped to plaintiff in error from Spokane, Washington, where the printing establishment of defendant in error is situated

12. That Weldy has never made any claim for the property or its value, and makes no claim thereto;

13. That neither Weldy nor plaintiff in error has paid for said property.

From the foregoing it will be seen that the principal question presented to the District Court and likewise here presented, is whether one who delivers property to another under a contract entered into in violation of a statute, enacted to carry out the public policy that all county printing shall be done within the state, can invoke the aid of the courts to recover the value of such property. The District Court held that such a recovery could be had. To reverse this holding this case is brought here for review.

SPECIFICATION OF ERRORS.

1. The court erred in holding and deciding that the contract entered into between defendant in error and one B. B. Weldy, although contrary to law and therefore void, was still susceptible of substantial enforcement against plaintiff in error, which substantial enforcement consists of a judgment requiring plaintiff in error to pay the value of the goods delivered thereunder.

2. The court erred in holding and deciding that, notwithstanding the conceded invalidity of the contract entered into between defendant in error and B. B. Weldy by reason of the same being in contravention of statute law, defendant in error was entitled to maintain an action for the recovery of the value of property delivered thereunder from plaintiff in error.

3. The court erred in holding and deciding that, notwithstanding the parties hereto were *in pari delicto* in violating the law in entering into the original contract with Weldy and the subsequent contract of subletting by Weldy to defendant in error, under which last mentioned contract defendant in error furnished the property claimed in this action, defendant in error was entitled to maintain an action against plaintiff in error for the recovery of the value of such property.

4. The court erred in holding and deciding that, the contract between defendant in error and Weldy being void, no title to the property delivered thereunder passed to plaintiff in error, and that even though such invalidity was by reason of a violation of law in entering into said contract, still defendant in error was entitled to recover the value of such property.

5. The court erred in holding and deciding that defendant in error could maintain an action against plaintiff in error upon a transaction arising and growing out of the violation by defendant in error of Section 2897 of the Revised Codes of the State of Montana prohibiting contracts for county printing to be sublet to any printing establishment outside of the State of Montana.

6. The court erred in holding and deciding that defendant in error was entitled to disaffirm a contract let in contravention of Section 2897 of the Revised Codes of the State of Montana, which contract had been fully performed on its part, and thereupon recover whatever of value it had parted with under such contract.

7. The court erred in holding and deciding that defendant in error was entitled to maintain an action at law for the recovery of the value of property parted with by it under a con-

tact entered into in violation of the statutes of the state of Montana.

8. The court erred in holding and deciding that any action could be maintained by defendant in error for the recovery of the value of property parted with by it in a transaction in which it admitted its violation of the statute law of Montana declaratory of the policy of the state with reference to contracts for printing furnished to its municipal sub-divisions.

9. The court erred in holding and deciding that to compel plaintiff in error to pay for property delivered to it by defendant in error under a contract entered into in contravention of statutory enactment was undoing what had been wrongfully done, when the effect of the enforcement of such a judgment is to effectuate the performance of such illegal contract.

10 The court erred in holding and deciding that notwithstanding the admitted violation by defendant in error of the statute law of Montana in entering into the contract under which it parted with the property received by plaintiff in error, and notwithstanding it became and was necessary for defendant in error to show such violation of law in order to establish a cause of action against plaintiff in error, still defendant in error was entitled to invoke the aid of the courts to recover the value of such property.

11. The court erred in holding and deciding that notwithstanding the transaction by reason of which defendant in error parted with its property to plaintiff in error was one in violation of law, and defendant in error admits in the agreed statement of facts such violation of law, yet it was entitled to recover the value of such property from plaintiff in error.

12. The court erred in holding and deciding that defend-

and in error could sue for and recover the value of property parted with by it under the terms of a contract entered into by it with full knowledge that the same was prohibited by the statutes of Montana, and which knowing violation of law it was necessary to prove in order to show how it parted with its property and how plaintiff in error received the same.

13. The court erred in holding and deciding that the agreed statement of facts and the admissions contained in the pleadings were sufficient to justify a judgment in favor of defendant in error.

BRIEF OF THE ARGUMENT.

I.

UPON THE MERITS.

Inasmuch as the principal question raised by the specifications of error is whether the District Court erred in rendering judgment in favor of the defendant in error under the agreed statement of facts, it can serve no useful purpose to discuss such specifications of error *seriatum*. They will therefore be first discussed as a whole, upon the principal question suggested, and afterward such questions collateral or incidental to this principal question as seem to the writer to be raised thereby will receive separate consideration.

The fundamental reason why the District Court was in error in rendering judgment in favor of the defendant in error, lies in the admitted fact that its cause of action in the case at bar arises out of its deliberate violation of a statute of Montana. This violation of law consisted in defendant in error entering into the contract of subletting with Weldy for the furnishing by it to Hill County of the printing and printed matter sued for

in the case at bar and the furnishing of the same thereunder. Section 2897 of the Revised Codes of Montana of 1907, above quoted, prohibits the entering into of such a contract. The Supreme Court of Montana held this particular contract of subletting invalid and unenforcible.

Hershey v. Neilson, 47 Mont. 132.

The contract, therefore, being illegal and not susceptible of enforcement, no rights growing out of the same or arising by virtue of acts done thereunder can be enforced. Hence defendant in error should not have been permitted to recover in the case at bar.

Speaking generally it may be said that a county is liable upon *quantum meruit*, the same as an individual, for property received and retained by it, when no statute limits or forbids the exercise of its power to make a contract therefor; but no recovery can be had and no liability exists if the contract or transaction out of which the cause of action sued on arose was in violation of the express terms of a statute, as in the case at bar.

In the case of Mulnix v. Mutual Benefit Life Insurance Company, 33 L. R. A. 827 the Supreme Court of Colorado had practically the identical question involved in the case at bar under consideration. In that case the court said:

> "The claim is further made that the state has had the benefit of the goods purchased, and should be liable as under an implied contract, or upon a quantum meruit. It has been held that a municipal corporation may be bound upon an implied contract made by its agent. Such contract, however, must be within the scope of the corporate powers, and must not be one which the charter or law governing the corporation requires should be made in a particular way or manner. So, also, a corporation may be liable upon a *quantum meruit*, the same as an indi-

vidual, when it has received and used the goods purchased when no statute forbids or limits to a certain method the exercise of its power to make a contract therefor. See the authorities already cited, and, in addition, McDonald v. New York, 68 N. Y. 23, 23 Am. Rep. 144; Wells v. Salina, 119 N. Y. 280, 7 L. R. A. 759; Kramath v. Albany, 127 N. Y. 575. If this principle is applicable to the state, even if a suit to enforce its liability was permissible, the case at bar does not fall within it, for the prescribed mode of contracting for the goods was not observed; and even if contracts of purchase, when made in the prescribed way, are within the scope of the officer's authority, this contract was *ultra vires*, because executed by him in express violation of the law. Being so, it is not susceptible of ratification, no implied liability arises, nor is the state bound upon a *quanium meruit*."

The same effect is the case of Hinnen v. Newman, 12 Pac. 144. In that case the Supreme Court of Kansas said:

"The whole transaction between these parties contravenes public policy, and is clearly illegal; and the general rule is that an action founded upon an illegal transaction, where the parties are *in pari delicto*, cannot be maintained. In all such cases the courts refuse to assist the parties to carry out or to reap the fruits of the illegal transaction, but will leave them in the condition in which they were found. In applying this principle, the supreme court of the United States has said: 'The law leaves the parties to such a contract as it found them. If either has sustained a loss by the bad faith of a *particeps criminis*, it is but a just infliction for premeditated and deeply-practiced fraund, which, when detected, deprives him of anticipated profits, and subjects him to unexpected losses. He must not expect that a judicial tribunal will degrade itself, by the exertion of its powers, by shifting the loss from one to the other or equalize the benefits or burdens which may have resulted by the violation of every principle of morals and of laws.' Bartle v. Coleman, 4 Pet. 184.

Here both of the parties before the court were directly

concerned in the transaction. Together they secretly conspired to and did commit a wrong against others. The transaction, tainted with illegality, was voluntarily entered into and consummated by them. There was no constraint upon the plaintiff compelling him to carry out the unlawful purpose, nor does any fact appear which affords him any excuse for his misconduct, or that would bring him within any of the exceptions to the rule that has been stated."

And see foot note to case last cited, reading as follows:

"That no action of any character can be maintained to enforce a right growing out of an illegal transaction, see Feineman v. Sachs, (Kan.) 7 Pac. Rep. 222; Bach v. Smith, (Wash. T.) 3 Pac. Rep. 831; Mackintosh v. Renton, Id. 830; Fisher v. Lord, (N. H.) 3 Atl. Rep. 927, and note; Gould v. Kendall, (Neb.) 19 N. W. Rep. 492; Clark v. Lincoln Lumber Co. (Wis.) 18 N. W. Rep. 492; Gibbs & Sterrett Manuf'g Co. v. Brucker, 4 Sup. Ct. Rep. 572."

In the case of Harrison County v. Ogden, 108 N. W. 451 the Supreme Court of Iowa had under consideration the question of the validity of certain county warrants issued for bridge construction furnished by a member of the board of supervisors in contravention of statute. In that case the suggestion was advanced, as it was advanced in the case at bar in the District Court, that the county by retaining the benefits of the supplies furinshed became liable for the value thereof. In that regard the court said:

"It is further said that, even if the transaction falls within the prohibition of the statute, the county has received the benefit of the work, and that it is inequitable and unjust to hold the warrants void. It is a fundamental rule, however, that rights based on the violation of the law will never be enforced by the courts, and this without reference to the wish of either party to the transaction. If the court is advised that the transaction is

illegal because in contravention of a statute making it a criminal offense, it is sufficient to justify a refusal to uphold the transaction in any way."

The case of Berka v. Woodward, decided in 1899, and reported in 45 L. R. A. 420, presented the situation of a member of the city council of the city of Santa Rosa having furnished to that city lumber and materials which the city accepted and retained, issuing its warrants therefor to the plaintiff. The defendant, city treasurer, refused to pay such warrants and an action was brought against him. In a most excellently considered opinion by Judge Henshaw it was held that the city could not be compelled to pay for such lumber and materials. In that regard the court said:

"Where contracts of public officials with their counties or municipalities have not been expressly forbidden by law, the principles which we have been considering have in some cases been applied, and a recovery has been permitted. In these cases it has been said that the demands of public policy have been satisfied by allowing the officer to recover, not according to the terms of his contract, but upon a *quantum meruit* or *quantum valebat.* Spearman v. Texarkana, 58 Ark. 348, 22 L. R. A. 855; Pickett v. School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Concordia v. Hagaman, 1 Kan. App. 35; Gardner v. Butler, 30 N. J. Eq. 702; Call Publishing Co. v. Lincoln, 29 Neb. 149; Macon v. Huff, 60 Ga. 221; Currie v. School Dist. No. 26, 35 Minn. 163; Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670. But in no one of these cases, nor indeed in any case which has come under our observation, have the courts entertained any contract, *or any rights growing out of a contract,* where either the consideration is base, or the contract is against the express prohibition of the law. * * * * This, then, is the undoubted rule, that, when a contract is expressly prohibited by law, no court of justice will entertain an action upon any asserted rights growing out of

it. And the reason is apparent; for to permit this would be for the law to aid in its own undoing. Says the Supreme Court of the United States in Bank of United States v. Owens, 2 Pet. 527, 7 L. Ed. 508: 'No court of justice can, in its nature, be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of law? * * * There can be no civil right where there can be no legal remedy; and there can be no legal remedy for that which is itself illegal.' And again the same august tribunal, in Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244, says: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract and void for the same reason. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation.' And in our own state it has been said (Swanger v. Mayberry, 59 Cal. 91): 'The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by a statute on the ground of public policy.' Nor in such cases does it matter whether the contract has been partially or wholly performed, or whether the consideration has passed or not. 'The test,' says Judge Duncan in Swan v. Scott, 11 Serg. & R. 164, 'whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. *If the plaintiff cannot open his case without showing that he has broken the law, a court will not assist him, whatever his claims in justice may be upon the defendant.*' And this must be so; for, while, as a matter of private justice between individuals, it would

be but fair that one, under such an illegal contract, should restore the consideration or should make the payment, the rights of the public are superior to any such private considerations, and the public's rights is that the fountains of justice shall remain unpolluted; that no court shall lend its aid to a man who grounds his action upon an immoral or illegal act. Therefore there is no place for equitable considerations, presumptions, or estoppels. Fowler v. Scully, 72 Pa. 456, 13 Am. Rep. 699. *Ex turpi causa non oritur actio.* Whenever such a contract comes before the court, the action must fail, and the parties will be left in the situation in which they may be found. Some slight attempt will be found in some of the cases to evade the application of this well-settled doctrine upon the ground of the hardship which sometimes results, but in no case, we think, has the existence of the rule been denied, or its justice as a matter commanding public necessity been questioned." (Italics ours.)

In the case at bar not only was it necessary for defendant in error to disclose at the very beginning of its proof that the furnishing of the property sued for was under a contract entered into in violation of law, but such violation is expressly pleaded in the complaint. (Complaint of defendant in error, Printed Transcript pp. 2-3). In addition to which the agreed statement of facts discloses that this property was all delivered under and in pursuance of the terms of this illegal contract of subletting between Weldy and defendant in error and with full knowledge on the part of defendant in error of its legality. (Printed Transcript pp. 30-31-32-33-34). The pertinency therefore to the case at bar of the language just quoted from the opinion in the case of Berka v. Woodward, 45 L. R. A. 420, is apparent.

It is true there are cases holding that when a contract is void and not susceptible of enforcement, a recovery can sometimes

be had of money or property parted with thereunder. Some of these cases were cited by counsel for defendant in error in the District Court, and will hereinafter receive more extended consideration. They all proceed upon the distinction which exists between contracts *void* merely because of failure to observe statutory pre-requisites to their execution, and contracts which, like the one under consideration, are *illegal* because in violation of positive law or in contravention of public policy. That this distinction exists, and that it is controlling against defendant in error in the case at bar, cannot admit of doubt. In the first class of cases a recovery is often permitted, especially where the contract has been entered into and partially performed in good faith by both parties; but in the latter class of cases a recovery is uniformly denied. The Supreme Court of Appeals of Virginia had occasion to point out this distinction in the somewhat recent case of Roller v. Murray, 72 S. E. 665. In that regard the court said:

> "The general rule is that where an agreement is treated as void merely because it is not enforceable, as in cases under the statute of frauds or of parol agreements where the contract is not in writing and money is paid or services are rendered under it by one party and the other avoids it, there can be a recovery upon an implied assumpsit for the money paid or the value of the services rendered. In such cases there has been the mere omission of a legal formality, and while by the terms of the statute he must lose the benefit of his contract, yet, there being nothing illegal or immoral in it, he is entitled to be compensated for the services rendered under it. * * * On the other hand, it is also well settled, as a general rule, that where the contract is *illegal, because contrary to positive law or against public policy, an action cannot be maintained, either to enforce it directly or to recover the value of services rendered under it, or money paid on it.* * * *

A champertous agreement being unlawful, it would seem clear that compensation for services rendered under it could not be recovered upon a *quantum meruit*, any more than upon the agreement itself, without overturning the very foundations upon which the rule refusing to enforce unlawful agreements is based. Of what value would the rule be, if the courts permit that to be done by indirection which they refuse to allow to be done directly? Why say to the attorney, 'You shall not recover upon the champertous agreement the agreed value of the services rendered by you, but you may recover upon an implied contract (which in fact never existed) the value of such services,' which in this case is claimed and shown to be the same as the agreement provided for? How would any such result uphold the policy of the law, deter others from entering into similar contracts, or promote the public good? To permit a recovery upon *quantum meruit*, instead of discouraging, would encourage, the making of such contracts; for, if the client kept and performed his unlawful agreement, the attorney would get the benefit of it, and if he did not, the attorney would suffer no loss, since he could recover upon the *quantum meruit* all that his services were worth. Any process of reasoning which leads to such a result we think must be unsound." (Italics ours).

The case of Benson v. Bawden, 13 L. R. A. (N. S.) 721 presented practically the identical principle involved in the case at bar. There an illegal contract was entered into for fixing the location of a postoffice in a certain building and maintaining the same there for a certain period. Acting under this illegal contract the assignor of plaintiff furnished certain fixtures and property to defendant. The defendant refused to return the property after retaining it under the illegal contract for several years. In holding that there could be no recovery of the value of such property the Supreme Court of Michigan said:

"It is well settled that the law will not aid either party to an illegal agreement. It leaves the parties where it finds them. Neither a court of law nor equity will aid the one in enforcing it, or give damages for the breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. 9 Cyc. Law & Proc. pp 546 et seq., and cases cited; Walhier v. Weber, 142 Mich., and cases cited on page 325, 105 N. W. 773. By this suit plaintiff is, in effect, asking the aid of the court to recover back property parted with under an illegal agreement. She is in no better position than her assignor, and, in asking the court for the value of the property claimed to have been converted, is unable to exhibit her case without presenting to the court the question of the illegality of this contract. * * * These parties are equally in the wrong, and the court will leave them where it finds them."

This case would seem to dispose of the contention made by counsel for defendant in error in the District Court that a distinction exists between suits to recover when specific property is delivered under an illegal contract, and suits to recover when money is paid thereunder. On principle, the character of the property delivered under an illegal contract cannot be determinative of the existence or non-existence of a cause of action. Nor will a party to such a contract be permitted to recover when the property delivered remains in specie, and denied a recovery when it does not remain in specie, or is of a character that does not admit of segregation. The controlling consideration is not that property in specie has been delivered under the illegal contract, but that the courts will not lend their aid to the circumvention of a statutorily declared public policy by permitting a recovery when any character of property is so delivered.

See also Chicago I. & L. Ry. Co. v. Southern Indiana Ry. Co., 70 N. E. 843 where the Supreme Court of Indiana used the following language:

> "The appellant is seeking to enforce a contract illegal in itself. The law will refuse to lend its aid to that end. Executory, it will interfere at the suit of neither party; *executed in whole or in part, it leaves the parties where they have placed themselves.* Brewing Co. v. Hartman, 19 Ind. App. 603, 49 N. E. 864; Woodford v. Hamilton, 139 Ind. 481, 39 N. E. 47; Hutchins v. Weldin, 114 Ind. 80, 15 N. E. 804; Schmueckle v. Waters, 125 Ind. 265, 25 N. E. 281." (Italics ours).

Nor does it militate against the rule laid down by these authorities that the refusal of the courts to grant relief to parties *in pari delicto* in the violation of a statute, will result in one party receiving a benefit for which he renders no equivalent. As was said in the case of Burck v. Abbott, 54 S. W. 314:

> "Nor does it vary the rule that appellants who invoke the doctrine are equally guilty, and can thus by their unlawful acts obtain an unconscionable advantage. The policy of the law is to discounteance the making of such contracts, and it is thought this can be done in no more effective way than by a refusal to enforce them, and this is done without regard to the effect it may have upon the parties to the prohibited transaction."

See also Jourdan v. Burstow, 74 Atl. 124.

> "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act."

Pendleton v. Asbury, 78 S. W. 651.

In the case of Gilchrist v. Hatch, 100 N. E. 473, decided in 1913, the Supreme Court of Indiana stated the general rule as follows:

> "A contract against sound morals or public policy cannot be enforced, and, where it has been wholly or partly

executed, the law will extend no relief, but will leave the parties where they have placed themselves. In such cases the maxim applies, 'In pari delicto portior est conditio de defendentis.' Hutchins v. Weldin, 114 Ind. 80, 15 N.E., 804; Overshiner v. Wisehart, 59 Ind. 135."

The rule is thus stated in 2 Wils. 341, 1 Smith's Leading Cases (11th Ed.) 371:

"Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the court to fetch it back again."

The Supreme Court of Oklahoma in the case of Atchison T. & S. F. Ry Co. v. Holmes, 90 Pac., 22, quoting with approval from 9 Cyc. 546, said:

"No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim. The rule is expressed in the maxims, 'Ex dolo malo non oritur actio' and 'In pari delicto potior est conditio defendentis.' The law, in short, will not aid either party to an illegal agreement. It leaves the parties where it finds them. Therefore neither a court of law nor a court of equity will aid the one in enforcing it, or give damages for a breach of it, or set it aside at the suit of the other, or, when the agreement has been executed in whole or in part by the payment of money or the transfer of other property, lend its aid to recover it back. The object of the rule refusing relief to either party to an illegal contract, where the contract is executed, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of, or relief from, the illegal agreement."

Nor is the doctrine announced by these authorities confined to the state courts. It has received the sanction of the Federal Courts as well. The Supreme Court of the United States

in the case of McMullen v. Hoffman, 174 U. S. 639, used the following language:

> "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract. *In case any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract.*" (Italics ours.)

And the same rule is applicable to equity actions as to actions at law. As was said by the Supreme Court of California in the case of Colby v. Title Ins. & Trust Co., 117 Pac. 913:

> "It is true that, as a general rule, equity will not aid one party or another to an illegal transaction where they stand in pari delicto, but will leave them just where it finds them, to settle these questions without the aid of the court. This rule is universally recognized, and a few of the many authorities announcing it are Pomeroy's Eq. Jur. (3d Ed.) pp. 659, 667, 1703; Atwood v. Fisk, 101 Mass. 363, 100 Am. Dec. 124; Ager v. Duncan, 50 Cal. 325; Hays v. Windsor, 130 Cal. 230, 62 Pac. 395; Chateau v. Singla, 114 Cal. 91, 45 Pac. 1015, 33 L. R. A. 750, 55 Am. St. Rep. 63, cited by respondent."

The following cases also sustain the doctrine contended for:

Vandegrift v. Vandegrift, 75 Atl. 365.
Brown v. School District, 10 Atl. 119.
Pittsburgh Const. Co. v. West Side Belt R. Co., 151 Fed. 125.
Dunn v. Stegeman, 101 Pac. 25.
Hanover Nat'l Bank v. Nat'l Bank, 109 Fed. 421.
Butler v. Agnew, 99 Pac. 395.
Moore v. Moore, 62 Pac. 294.
Embry v. Jemison, 131 U. S. 336.
Ray v. Davidson, 111 N. W. 25.
Citizens Nat'l Bank v. Mitchell, 103 Pac. 720.

Alexander v. Barker, 67 Pac. 829.
Howell v. City of Hamburg Co., 131 Pac. 130.
Roy v. Harney & Co., 110 N. W. 106.
City of Pittsburg v. Goshorn, 79 Atl. 505.
Winchester Elec. Light Co. v. Veal, 41 N. E. 334.
Otis v. Freeman, 85 N. E. 168.
Maniscano v. Mayor, 51 So. 608.
Glass v. Childs, 71 S. E. 920.

The principle declared by these authorities has been crystalized into statute in this jurisdiction. Revised Codes of Montana of 1907, Sec. 6192, reads as follows:

> "Between those who are equally in the right or equally in the wrong, the law does not interpose."

And this statute has been construed by the Supreme Court of Montana in the case of Melville v. Butte & Balakava Mining Company, 130 Pac. 441 to mean what it says.

The citation of further authority to sustain the rule contended for would seem to be a work of supererogation. There is a practical unanimity of judicial decision sustaining it. If there are cases holding the contrary they assuredly are, as was said by the Supreme Court of California in the case of Exparte Drexel, 82 Pa. 429; "not of sufficient consequence to ruffle the great current of authority which runs the other way."

The principle upon which these decisions rest is not that one party to the mutual violation of a statute should obtain an advantage over the other, but that the courts will not aid in carrying out transactions between parties which are contrary to public policy. As was said by the Supreme Court of Colorado in the case of Russel v. Courier Printing & Publishing Co., 95 Pac. 936:

> "Public policy, with respect to the administration of the law, is that rule of law which declares that no one can

lawfully do that which tends to injure the public, or is detrimental to the public good. 23 Cyc. 455. All contracts contrary to public policy are void. If either party to a contract of that character seeks redress from the other, he will be left by the courts in the position in which he placed himself. It does not sound well for a defendant to say that a contract which he deliberately entered into, and of which he has had the benefit, is void because contrary to public policy; but it is not for his sake, or for his protection, that the objection is allowed, but for the protection of the public, by thus preventing this character of contracts being made, and avoiding evils which naturally result therefrom. Hope v. Linden Park Ass'n, 58 N. J. Law, 627, 34 Atl. 1070, 55 Am. St. Rep. 614; Drake v. Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986."

In the case at bar the legislative assembly of Montana has declared the public policy of that state relative to contracts for county printing. This Court is not required to speculate whether the particular transaction here drawn in issue is or is not against public policy. The statute has unequivocally resolved that question against the contract under consideration. Defendant in error saw fit to speculate as to whether that legislative declaration of public policy would be upheld by the courts, and having discovered through the medium of the case of Hershey v. Neilsen, 47 Mont. 132 that it is upheld, it now asks the aid of this court in recovering what it lost by reason of that speculation. That assistance, it is respectfully submitted, should not, under the authorities cited, be vouchsafed.

II.

THE POSITION OF DEFENDANT IN ERROR IN THE DISTRICT COURT.

Counsel for defendant in error conceded in the District Court, and will doubtless also here concede, the invalidity of

the contract of subletting entered into with Weldy. Indeed the Supreme Court of Montana held such contract invalid in the case of Hershey v. Neilsen, 47 Mont. 132, and granted a permanent injunction against carrying out its terms. So far as that is concerned the position of defendant in error in the district Court, frankly was that inasmuch as this contract was illegal, having been entered into a violation of law, no title to the property delivered thereunder passed to Hill County, hence such title having been in defendant in error at the time of the conversion of the property by Hill County, the present action will lie to recover the value thereof. This position carries with it as a necessary corollary, the novel legal proposition that a cause of action in one's favor, which otherwise could not exist, can be created by a violation of law; for if the contract of defendant in error with Weldy had not been entered into in contravention of the statute, and therefore had been valid, the cause of action arising in its favor would have been one for nonpayment under the contract and would have been *for the contract price.* Yet because defendant in error saw fit to violate the law, and because, therefore, its contract with Weldy was invalid, it finds itself the possessor of and brings the wholly distinct and different action for a conversion. No such cause of action as this could have arisen if defendant in error had not violated the law; from which it follows, if its position is well founded, that its violation of law created the cause of action. It is respectfully submitted that one cannot create a cause of action in his own favor by the violation of a statute. But without regard to the anomoly above adverted to, the position of defendant in error requires a brief consideration of the nature of the cause of action claimed by it in the case at bar. The com-

plaint in the present action is a somewhat novel document. It first alleges a contract, ostensibly valid, and the delivery to Hill County of certain property thereunder; then avers certain facts which show such contract to be invalid and that Hill County asserts its invalidity and refuses to pay for the property so delivered; then alleges that Hill County, after the delivery of the property, converted the same to its own use and finally charges that at the time of such conversion defendant in error was the owner and entitled to the possession of this property. (Complaint paragraphs IV, V, VI, VII, VIII; Printed Transcript pp. 2 and 3).

It would seem that this complaint by its allegations works its own undoing. If the contract alleged was in fact a contract, then there could have been no conversion; on the other hand if it was no contract because entered into in violation of law, as the complaint practically avers, then there can be no recovery for the value of the property delivered thereunder. Again, if the contract was in fact a contract, then as a matter of law defendant in error was not the owner of the property nor entitled to the possession of the same at any time subsequent to its delivery to Hill County, the averments of the complaint to the contrary notwithstanding. From the averments of the complaint it is evident that defendant in error takes the position that it is entitled to recover in this action for a conversion of its property by Hill County. In other words it is endeavoring to repudiate the illegal contract of subletting with Weldy and base a cause of action on such repudiation. If, however, the action is one for a conversion it necessarily rests upon the implied obligation which arises when one appropriates property belonging to another to pay the reasonable value thereof. But the rule is in-

flexible that no implied contract can arise where any restrictions are imposed by law upon the party sought to be charged, against making in direct terms a similar contract to that implied.

Zottman v. San Francisco, 20 Cal. 96.

Approved in Missoula St. Ry. Co. v. City of Missoula, 47 Mont. 85.

Spitzer v. Blanchard, 46 N. W. 400.
2 Page on Contracts, Sec. 1012.
Macy v. Duluth, 71 N. W. 687.

See also Kramrath v. City of Albany, 28 N. E. 400, in which case the Court of Appeals of New York used the following language:

> "That corporations may be bound upon implied contracts made by its agents, and to be deduced from corporate acts without a vote of the governing body, is now well established. Within the practical application of that rule, such contract must be within the scope of the corporate powers, and must not be one which the charter or law governing the corporation requires should be made in a particular way or manner. Dill. Mun. Corp. Secs. 383, 384, and cases cited in note; 2 Kent, Comm. p. 291; Bank v. Patterson, 7 Cranch, 299; Peterson v. Mayor, 17 N. Y. 449; Gas Light Co. v. Mayor, 3 Rob. (N. Y.) 124, affirmed 33 N. Y. 309; Nelson v. Mayor, 63 N. Y. 535; McCloskey v. Mayor, 7 Hun. 472. When the act done is *ultra vires*, it is void, and there can be no ratification, and, when the mode of contracting is limited and provided for by statute, an implied contract cannot be raised."

To the same effect is the case of Capital Bank of St. Paul v. School District No. 53, 48 N. W. 363 where the Supreme Court of North Dakota said:

> "The contract out of which the warrants grew was not merely beyond the power of the corporation; it was prohibited by the spirit and policy of the law. An express

> prohibition would not, as we construe the statute, add any strength to this view of the case. The law will not imply a promise to pay against its own prohibitions, nor will the courts suffer a policy once declared to be defeated by the receipt of the benefits of a contract which that policy condemns."

Inasmuch therefore, as it is conceded by defendant in error that its direct contract for the delivery of this property was invalid, under the authorities cited no implied promise to pay arose out of the transaction which would permit a recovery.

It is only fair to defendant in error to say that its contention in the District Court was that it was not seeking the enforcement of this contract of subletting with Weldy. It there declared itself as expressly disaffirming the contract, as its counsel stated in their brief, "for the purpose of undoing what was done in violation of law." Notwithstanding these fair words plaintiff is in reality seeking in the present proceeding to accomplish the enforcement of its illegal contract of subletting with Weldy. This is so because inasmuch as it will be presumed defendant in error agreed to furnish these printed supplies under its contract at their value, to permit a recovery of their reasonable value would be in effect a carrying out of that contract according to its precise terms. It would be accomplishing by indirection something defendant in error cannot accomplish directly. It is apparent that there is no difference between enforcing this illegal contract according to its terms and a so-called disaffirmance of it and requiring plaintiff in error to pay the reasonable value of the printed supplies delivered under its terms. "Things equal to the same thing are equal to each other." It seems hardly necessary to add that if defendant in error can prevail in this action, the statute prohibit-

ing counties contracting for county printing with printing establishments outside the state is wholly emasculated. All that such non-resident concern need to do is to enter into a contract in violation of the statute, furnish printing supplies thereunder, and then blandly insist that the contract is invalid but that nevertheless it is entitled to recover the value of the supplies so furnished. It is most respectfully submitted that the courts should not assist in this subterranean method of circumventing the legislative will.

Additionally it is a matter of grave doubt whether defendant in error possesses any right to disaffirm a contract which never at any time possessed any validity, and which in any event is no longer as to it in any respect executory. Having as fully executed such illegal contract as it is possible for it to do, defendant in error has placed the same beyond its power to disaffirm.

But without regard to the foregoing it is respectfully submitted that defendant in error cannot alter its position to its advantage by evincing a present desire to disaffirm a contract entered into in violation of law under which it has done every act possible to effectuate such violation. So far as defendant in error is concerned the day of repentance has passed.

Counsel for defendant in error contended in the District Court that inasmuch as section 2897 of the Revised Codes of Montana does not prescribe a penalty for its violation, it would be "imposing a penalty which the legislature did not see fit to provide" if the court should deny a recovery in the case at bar. It is true that this statute does not prescribe a penalty to be visited upon boards of county commissioners for entering into contracts in violation of its terms, nor does it in terms provide

that such contracts are invalid. Even so, there is no merit in the suggestion adverted to. When a contract is entered into in violation of the terms of a statute it follows as a matter of law that the same is invalid and unenforcible. The Supreme Court of Montana so held as to this particular contract in Hershey v. Neilson, 47 Mont., 132. It likewise follows as a matter of law, under the principle announced by the authorities cited, *supra*, that the parties to such an illegal contract will be left by the courts in the situation in which they are found, so far as the recovery back by one from the other of anything of value parted with thereunder is concerned. It is not essential that the statute provide in terms for these ensuing consequences. Indeed, if this statute had denounced a penalty against boards of county commissioners for violating its terms, we would beyond doubt be confronted by the suggestion from defendant in error that this penalty is exclusive in character.

III.

AUTHORITIES RELIED ON BY DEFENDANT IN ERROR IN THE DISTRICT COURT.

Inasumch as the District Court in rendering its opinion in the case at bar in favor of defendant in error refers to the case of Morse v. Granite County, 19 Mont., 450, and states that said case is the same in principle as the case under consideration, "and is conclusive of plaintiff's right to recover," a brief analysis of that case, and others relied upon by defendant in error in the District Court, may not be wholly unprofitable.

In the case of Morse v. Granite County, *supra*, the facts were that one Cain, in violation of a statutory prohibition, assumed to sell to Granite County certain supplies when he was

a member of the board of county commissioners of that county. Upon proceedings had in that behalf, by a taxpayer, this contract was adjudged to be wholly void, and thereupon Cain transferred said property to one Morse, and Morse transferred the same to Granite County. Morse was statutorily qualified to contract with the county, and the only question, therefore, for determination in that case was whether after the adjudication against the validity of his contract with the county, title to the property theretofore assumed to be sold to it remained in Cain so he could transfer it to another person. The Supreme Court of Montana properly held that this so-called sale being void, title did not pass thereunder, and that Cain was still the owner of the property and could transfer the same. This was the only question necessary for decision, and the only question decided in Morse v. Granite County. It is true enough that the Supreme Court of Montana in the course of its opinion in that case used the following language:

> "If, after such adjudication by the district court, the county kept possession of the property, and appropriated it to its use, it could not avoid paying the reasonable value thereof, because the contract by which it obtained it was *ultra vires*, illegal, and void."

The most casual reading, however, of the facts in that case makes it evident that this language is wholly *obiter dictum.* No question of the right of Cain to recover the value of this property from Granite County arose or could arise in an action by Morse to recover the value thereof; nor was it necessary, nor could it by any possibility be necessary, for the court to determine in an action brought by Morse what the rights of Cain might be in a direct action by him to recover the valeu of this property from Granite County. But, if the language

quoted could be said to be a substantive portion of the real adjudication in that case, it is amply demonstrable that the Supreme Court of Montana did not intend thereby to indicate that Cain could recover the value of such property from the county in a suit in which he must disclose his own violation of law in order to state a cause of action. The syllabus to that case reads as follows:

> "Where the sale of goods by a county commissioner to the county is declared to be void, under a statute, the title to the goods remains in the vendor; he may sell them, and *his vendee may sell them to the county and recover the reasonable value thereof.*" (Italics ours).

This is sound law, and it rests upon the principle that as between Morse and the county a wholly valid and statutorily authorized contract could be entered into, which contract would be, of course, susceptible of enforcement against the county. But if Cain had sued for the value of the property a wholly different situation would be presented and a wholly different principle of law involved. In that case Cain would be in the position of attempting to recover a loss sustained by his own violation of law, and under the authorities heretofore cited in this brief the courts would afford him no relief.

Again, the court in the course of the opinion in Morse v. Granite County cites with approval and as sustaining the doctrine claimed by defendant in error to be announced by the language above quoted, the case of State v. Dickerman, 16 Mont., 278. An examination of that case, therefore, may shed light upon what the court intended to really hold in the case of Morse v. Granite County. The case of State v. Dickerman presented the situation of a school district which had issued and sold certain of its bonds concerning the validity

of which there existed some question. Pending litigation to determine such question of validity the school district secured from the purchaser of the bonds an advancement of $20,000,00 on the purchase price. Subsequently the bonds were declared invalid, and the purchaser brought suit against the school district to recover the $20,000.00 so advanced. In and about the issuing and sale of the bonds and the securing of the advancement of $20,000.00 on the purchase price thereof the school district acted in good faith and in the belief that the bonds were valid. As was said in the course of the opinion:

> "The most, we think, that can be said in this case, is that there was an imperfect or defective attempt to comply with the law on the part of the trustees in the issuing of the bonds of the district. They had authority under the law to issue them for the purpose for which they were issued, but failed to give a sufficient notice of the purpose and conditions thereof in providing for the election to authorize their issuance."

Concerning the point under consideration and quoting with approval from the case of Brown v. City of Atchison, 17 Pac. 465, the court further said:

> "Where a contract has been entered into in *good faith* between a corporation, public or private, and an individual person, and the contract is void in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed in whole or in part by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, *and these benefits are such as one party may lawfully render and the other party lawfully receive*, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract

and placing the other party in *statu quo*, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return." (Italics ours).

This is tantamount to holding that it is a condition prerequisite to a recovery in cases of this kind that the benefits received are such as one party may *lawfully render* and the other party *lawfully receive*. Section 2897 of the Revised Codes of Montana having made it unlawful for counties to contract for county printing with a printing establishment outside of the state, printing supplies delivered under such an illegal contract are neither benefits which such printing establishment could *lawfully* render or Hill County *lawfully* receive. In addition to which it is to be observed that the case of State v. Dickerman falls within that class of cases where merely some antecedent statutory prerequisite to the entering into of a valid contract has been omitted, and hence, as pointed out in subdivision I of this brief falls within a wholly different legal principle than the case at bar where the entire transaction was in knowing violation of express statutory enactment declaring the public policy of the state relative to contracts for county printing. In State v. Dickerman the contract was at the most *void* because of lack of statutory authority to enter into the same in the manner adopted; in the case at bar the contract was *illegal* because entered into in contravention of statute law directed against any contract for county printing with a printing establishment outside the state.

If the Supreme Court of Montana in the case of Morse v. Granite County, *supra*, intended to declare that one party to a contract, illegal because prohibited by law, can notwithstanding such illegality recover whatever of value he parts with thereunder it assuredly was most unfortunate in citing State v.

Dickerman, *supra*, to sustain that view. The fact that the case of State v. Dickerman, so cited by it, does not sustain that view, seems very persuasive evidence that it was not intended that any such meaning as that claimed by defendant in error should be attached to the language used in Morse v. Granite County.

Counsel for defendant in error also cited in the District Court the case of Missoula Street Railway Company v. City of Missoula, 47 Mont. 85, and insisted that the following excerpt from the opinion sustains its contention in the case at bar:,

> "It may well be said that, in cases in which the municipality has acquired property which is still in specie, it may not be allowed to retain it and at the same time refuse to pay its reasonable value. In such a case, however, its liability would rest upon different principles. The contract being void, the title to the property would not vest under it, and the seller would be in a position to reclaim it, or, if restoration of it should be refused, to recover the reasonable value of it. But even in such a case the liability would not arise out of the contract."

In that case the action by the street railway company was upon certain contracts entered into by the city without compliance with certain statutory conditions precedent; and notwithstanding the fact that it was conceded that the city had received benefits aggregating $5,507.13 from the plaintiff thereunder, a recovery was denied. Here was a direct action by one of the parties to the void contract; and here was an excellent opportunity for the Supreme Court of Montana to hold, in conformity with what defendant in error claims was theretofore held in the cases of Morse v. Granite County, *supra*, and State v. Dickerman, *supra*, that one who is a party to such a void contract can recover whatever of value he parts with thereunder. But singularly enough the court held nothing of the

kind, but did hold that there could be no recovery, basing its decision upon the principle that the plaintiff knew when he entered into the contract and when expending moneys thereunder that the same was illegal; and upon the additional ground that to permit a recovery would be to remove the statutory limitation upon municipalities relative to their right to contract and permit them to do indirectly what they could not do directly. In that regard the court said:

> "In support of their last contention, counsel for plaintiff cite several cases which, in effect, hold that it is only when the subject matter of the contract is entirely outside of the scope of the corporate powers, or the contract is clearly prohibited, that the municipality will be permitted to escape liability; and they insist that notwitstanding the contracts in question are void, the plaintiff upon equitable grounds ought to be permitted to recover the reasonable value of such benefits as have been received by the defendant. As already observed, the complaint declares upon the contracts according to their express terms. It si therefore doubtful whether its allegation are sufficient to support a judgment for the reasonable value of the work done. But assuming that they are sufficient, still we do not think the plaintiff entitled to recover. The result of such a holding would establish a rule which would abolish completely all limitation upon the power of the council to bind the city, and thus defeat the very purpose had in view by the legislature in enacting the statute, viz., to promote economy and to protect the taxpayers from fraud and favoritism on the part of the council or the officers of the city. The equitable doctrine of estoppel can have no application to such a case. In entering into the contracts, the plaintiff was dealing with an artificial person, a creature of the law, whose authority to contract is conferred and limited by law. The facts were all known to it. There was no misrepresentation made to it. It knew the extent of the power of the council and how it must be exercised. It dealt with the council at its own

peril. (*Lebcher v. Board of Commissioners, supra; State ex rel. Stueve v. Hindson*, 44 *Mont.* 429, 120 *Pac.* 485; *State ex rel. Lambert v. Coad, supra*). If, when it began to work, the contracts were illegal, it knew it. It did the work with full knowledge of this fact. It was therefore not misled, and is not now in a position to allege that the defendant is estopped to question its own liability.

In *Zottman v. San Francisco*, 20 Cal. 96, 81 Am. Dec. 96, in considering the question involved here, Mr. Justice Field said: 'To the application of the doctrine of liability upon an implied contract, where work is performed by one, the benefit of which is received by another, there must not only be no restrictions imposed by the law upon the party sought to be charged against making, in direct terms, a similar contract to that which is implied, but the party must also be in a situation where he is entirely free to elect whether he will or will not accept of the work, and where such election will or may influence the conduct of the other party with reference to the work itself. The mere retention and use of the benefit resulting from the work, where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute such evidence of acceptance that the law will imply therefrom a promise of payment."

This language is most significant, for it recognizes the distinction contended for by plaintiff in error between contracts, such as the one at bar, entirely outside the scope of the corporate powers of Hill County because prohibited by statute, and contracts within the scope of corporate powers but entered into without observance of the statutory method of execution. In the first class of cases, such as the one at bar, the court appears to consider it not open to controversy that there can never be a recovery; and then holds that even in the second class of cases, under the facts in the case then under consideration, there can likewise be no recovery. Counsel for the street railway com-

pany in that case admitted in their brief that there can be no recovery of money or property parted with in cases where there is an express prohibition against entering into the contract under which the money is paid or the property delivered. The following language from such brief found on page 88 of the reported decision in the case of Missoula Street Railway Co. v Missoula, 47 Mont., 85 indicates this concession:

> "Where a municipal corporation receives and retains substantial benefits under contract which it is authorized to make but which is void because irregularly executed, *or which it is not prohibited from making by a positive prohibition*, it is liable in an action brought to recover a reasonable value of the benefits received." (Italics ours).

The decision in Missoula Street Railway Company v. Missoula, *supra*, is the latest expression of the Supreme Court of Montana upon the subject under consideration. If the language contained therein, and insisted upon by defendant in error as sustaining its position in the case at bar, be given its widest scope it amounts to no more than a holding that where property delivered under a void contract to a municipality remains in specie such municipality will be required to either return it or pay its reasonable value. As indicated in a previous portion of this brief, there is no principle of law to sustain the doctrine that the character of the property delivered is determinative of the existence or non-existence of a cause of action; but assuming it to be the rule, it has no applicability to the case at bar. By the allegations of the complaint it is disclosed that all the property delivered to Hill County by defendant in error has been converted to the uses of such county. Nowhere does it appear that it would be possible for Hill County to return such property or any substantial portion there-

of. Indeed the truth is that all of it has been used by Hill County. Of what pertinency, therefore, to the case at bar is the rule, if it be a rule of law, that property "which is still in specie" will be required to be returned or its value paid?

Counsel for defendant in error also cited in the District Court the case of Chapman v. County of Douglas, 107 U. S. 348, as sustaining their contention in the case at bar. That case is not an authority for the proposition to which it is cited, as the following language contained therein and quoted from Morville v. American Tract Society, 123 Mass. 129 amply demonstrates:

> "The money of the plaintiff was taken and is still held by the defendant under an agreement which it is contended it had no power to make, and which, if it had power to make, it has wholly failed on its part to perform. It was money of the plaintiff, now in the possession of the defendant, which in equity and good conscience it ought to pay over, and which may be recovered in an action for money had and received. *The illegality is not that which arises where the contract is in violation of public policy or of sound morals, and under which the law will give no aid to either party. The plaintiff himself is chargeable with no illegal act, and the corporation is the only one at fault* in exceeding its corporate powers by making the express contract." (Italics ours).

Counsel for defendant in error also cited in the District Court the case of Parkersburg v. Brown, 106 U. S. 487. That case presented an entirely different state of facts than the case at bar. There certain city bonds had been issued to assist the O'Briens in establishing a manufacturing plant within the city of Parkersburg. To guarantee the payment of the interest on such bonds and provide a sinking fund to eventually pay the principal, the O'Briens were required to execute a mortgage or deed of trust covering real estate of sufficient value to

accomplish such guarantee Bonds in the amount of $20,000,00 were issued to the O'Briens after certain real estate had been conveyed by them to the city in trust for the purpose indicated. Thereafter such bonds passed into the hands of *bona fide* purchasers for value, whereupon the city took the position that the bonds were invalid, having been issued in excess of the authority of the city and refused to pay any interest falling due thereon. A suit being brought by the *bona fide* third party holders of the bonds, the Supreme Court of the United States held that the bondholders were in equity entitled to have the trust properly applied to the payment of the bonds. As stated in the course of the opinion, "there was no illegality in the mere putting of the property in the hands of the city by the O'Briens." In the case at bar there was an illegality consisting of a plain violation of a statute of this state by defendant in error in putting the supplies furnished by it into the hands of Hill County. This distinction in the facts necessarily works a distinction in the legal principle applicable to that case and the case at bar.

Again, in the course of the opinion in the Parkersburg case it is said:

> "To deny a remedy to reclaim it (the trust property) it to give effect to the illegal contract."

In the case at bar to permit a recovery by defendant in error would be, as is indicated in subdivision II of this brief, to give effect to the illegal contract, in that thereby such contract will be as effectually carried out as if its precise terms were observed

Again, in the Parkersburg case the court said:

> "The property was transferred under a contract which was merely malum prohibitum, *and where the city was the principal offender.*" (Italics ours.)

In the case at bar the property was delivered by defendant in error in contravention of express statutory prohibition and where it was the principal if not the only offender. The Parkersburg case additionally was an action in equity. It would have been highly inequitable that the innocent *bona fide* holders of the bonds of the city should suffer the loss of the money paid by them for such bonds while the city retained the trust property conveyed for the express purpose of paying the same. The case at bar is an action at law.

To sustain the doctrine claimed by counsel for defendant in error to be announced in the Parkersburg case only three cases are cited in the opinion. The first, that of White v. Franklin Bank, 22 Pick. (Mass.) 181 contains the following language quoted from an opinion by Lord Mansfield in Smith v. Bromley, 2 Dougl. 696:

> "If the act is in itself immoral, or a *violation of the general laws of public policy*, there the party paying shall not have his action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis.*"

This would seem to suffice as a comment upon that case as an authority in favor of defendant in error.

The second case cited in Parkersburg v. Brown is that of Morville v. American Trust Society, 123 Mass. 129, and, as indicated by the quotation therefrom hereinbefore set out, that case holds directly against the contention of defendant in error.

The third case cited in the Parkersburg case is that of Davis v. Old Colony Railroad, 131 Mass. 258. That case merely holds that a subscription by a railroad corporation to a fund for the holding of a musical jubilee is void and unenforcible. This would seem to be sound law, but hardly in point on the proposition to which it is cited.

Another case cited by the defendant in error in the District Court is that of Butts County v. Jackson Banking Co., (Ga.) 15 L. R. A. (N. S.) 567. This was an equitable action wherein the Jackson Banking Company sued on certain promissory notes evidencing certain loans made to the county and used in taking up valid county warrants issued to pay current expenses. There existed a constitutional prohibition against counties borrowing money, and the court held that the notes were void, but that the Banking Company was entitled to be subrogated to the rights of the holders of the warrants paid by its moneys, which warrants were valid obligations of the county, and therefore that it could recover. In other words, the Banking Company by virtue of these loans which were applied to the liquidation of valid outstanding obligations, while it could not recover on its notes, became equitably subrogated to the rights of the holders of these obligations, and therefore could maintain an action against the county founded thereon. This accounts for the language contained in the opinion in that case to the effect that moneys secured by a municipality in violation of a statutory or constitutional provision if applied to the payment of legal and valid claims against such municipality can be recovered, while if applied to the payment of obligations which the municipality is prohibited by law from incurring, there can be no recovery. Cursorily considered there would seem to be no valid reason for recognizing a cause of action against a county merely because it expends moneys received by it in liquidating *valid* obligations, and denying a recovery when the application is to *invalid* obligations. But when it is considered that the ground of the distinction is the doctrine of subrogation to the rights of the holder of the obligation liquidated, the reason for the distinction becomes at once apparent.

But of what application to the instant case is this doctrine of equitable subrogation? To whose valid and subsisting claim against Hill County did defendant in error become subrogated by furnishing printing supplies to that county under an illegal contract? To the discharge of what valid claim against Hill County were the printing supplies furnished by defendant in error applied? To ask these questions is to answer them. There is not and cannot be any doctrine of subrogation in the case at bar, and the authority cited sustains in no respect the right of defendant in error to recover therein.

The only remaining case cited by defendant in error in the District Court is that of Brown v. City of Atchison (Kan.) 17 Pac. 465. This is a case cited and quoted from with approval by the Supreme Court of Montana in the case of State v. Dickerman, *supra*. As indicated by that quotation, which is contained in a previous portion of this brief, that decision is unequivocally against the principle contended for by defendant in error. The holding there was that if the benefit received under a void contract is one that could be lawfully rendered and lawfully received, and the parties have acted in good faith, a recovery can be had. It scarcely needs to be repeated that this is tatamount to holding that if the benefit is one which is prohibited by law from being either rendered or received, as in the case at bar, no recovery can be had.

We respectfully submit that this judgment should be reversed.

C. A. SPAULDING,
L. V. BEAULIEU,
For Plaintiff in Error.